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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. ————

ANTHONY TERAMINE,
Petitioner,

v.

C. J. SHUTTLEWORTH, *Warden,*
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Anthony Teramine, respectfully represents unto this Court as follows:

SUMMARY STATEMENT

Anthony Teramine filed his petition for Writ of Habeas Corpus in the District Court for the Eastern District of Michigan, Southern Division, on November 24, 1944, di-

rected to respondent, C. J. Shuttleworth, Warden of Federal Correctional Institution at Milan, Michigan, alleging that petitioner was unlawfully deprived of his liberty in that sentences theretofore imposed upon him were fully executed and satisfied by service thereof (R. 1, 2).

Sentence had been imposed on petitioner in cause 21737 on November 20, 1934, and he received concurrent eight year sentences in Federal Penitentiary at Leavenworth, Kansas; on the same day he entered upon service thereof (R. 7, 8, and 9); petitioner was paroled under this sentence of April 26, 1940 (R. 12, 15); on April 15, 1942, the Parole Board issued its warrant for retaking of petitioner as parole violator, and he was taken into custody and placed in Wayne County Jail at Detroit, on April 18th "awaiting further disposition" (R. 17, 18); the warrant above mentioned was *executed* and petitioner returned to Federal Correctional Institution at Milan, Michigan, on *May 26, 1942* (R. 18); the Board of Parole thereafter on August 7, 1942, revoked petitioner's parole (R. 2) and the petitioner's sentence thereunder was fully executed and satisfied on November 9, 1944 (R. 2, 13).

On May 25, 1942, petitioner was convicted and sentenced in case 26579, to two years' imprisonment in a Penitentiary to be selected by attorney general or his authorized representative, to begin as of the date he was received at such penitentiary *or when received at a jail awaiting transportation to such designated institution* (R. 3, 4). It was further ordered that sentence imposed "run consecutive to the *sentence that defendant is now serving in case No. 21737*" (R. 4).

The authorized representative of the attorney general designated the institution at which sentence was to be

served and pursuant thereto the United States Marshal executed the judgment and sentence by delivering petitioner to the Wayne County Jail *on May 25, 1942,* temporarily pending transfer to designated institution for service of such sentence (R 5).

The main question in this case is the time when petitioner entered upon service of second sentence, imposed on May 25, 1942.

The respondent says petitioner entered upon service of said second sentence on November 10, 1944, *after he had completed service of original sentence* (R. 12, 13).

Petitioner says he entered upon service of said second sentence on May 25, 1942, when he was delivered to the Wayne County Jail temporarily pending transfer to institution designated *before execution of Parole Board warrant for his retaking and before revocation of parole by such Board* (R. 1, 2).

OPINIONS BELOW

The District Court dismissed petitioner's petition for writ of habeas corpus on December 4, 1944 (R. 19). The Sixth Circuit Court of Appeals handed down a written opinion on October 17, 1944, affirming decision of the District Court (R. 25).

JURISDICTION

The judgment of the Circuit Court of Appeals to be reviewed was entered October 17, 1944 (R. 24).

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended (Title 28, U.S.C. Section 347).

THE QUESTIONS PRESENTED

1. Does sentence of imprisonment to a penitentiary commence to run from date convicted person is received at a jail awaiting transportation to place at which his sentence is to be served?

2. Does unexpired term of imprisonment of a person retaken under Board of Parole warrant for violation of terms of conditional release, begin to run from date of arrest, *or on date he is returned to a Federal Institution?*

3. Does Board of Parole have exclusive jurisdiction respecting time and manner of service of parole violator's unexpired term of imprisonment for first sentence, when, *prior to action of revocation of such parole,* the parolee is sentenced for a second offense?

REASONS RELIED UPON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI

1. The Sixth Circuit Court of Appeals held that petitioner's second sentence of imprisonment, imposed on May 25, 1942, *began to run on date on which he was received at penitentiary* for service of such sentence, rather than on date he was received at local jail awaiting transportation to designated institution; and by implication approved of the action of the sentencing judge requiring the Board of Parole to cause the petitioner to *first* serve the remainder of the sentence originally imposed before second sentence should begin to run.

2. The decision of the Court of Appeals does not consider, discuss or correctly apply the statutory provisions raised by the Record pertinent to this case. The pertinent statutory provisions being set forth in Title 18 U.S.C. Sections 709 (a), 718, 719, 723 (c); such sections being modified under headings: 709 (a) "Time when sentence begins to run"; (718) "officers authorized to execute warrant; expenses." (719) "Action by Board on issue of warrant; Revocation of Parole." 723 (c) "Violation of Parole; Warrant for retaking prisoner; effect of violation on unexpired term of imprisonment"; which statutes are set forth in full and appended hereto.

3. The decision of the Sixth Circuit Court of Appeals is directly contrary to the decisions of this Court and decisions in similar cases in other circuits. (*Zerbst v. Kidwell,* 304 U. S. 359 (1938); *Hammerer v. Huff,* 110 Fed. (2nd) 113, (C. C. A. Dist. Col.); *Tippitt v. Wood,* 140 Fed. (2nd) 689, (C. C. A. Dist. Col.); *Tippitt v. Squier,* 145 Fed. (2nd) 211, (C. C. A. 10)).

WHEREFORE, your petioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of the proceedings in case No. 10033, entitled on its docket, "Anthony Teramine, v. C. J. Shuttleworth, Warden," and that the judgment of said Circuit Court of Appeals in said case may be reversed by this Honorable Court, and that your petioner may have such other and further relief in the premises as to this Honorable Court may seem meet.

And your petitioner will ever pray.

JAMES V. BELLANCA,

DONALD F. WELDAY,
Attorneys for Petitioner.

WILLIAM G. FITZPATRICK, Jr.,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. ————

ANTHONY TERAMINE,
Petitioner,

v.

C. J. SHUTTLEWORTH, *Warden,*
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS BELOW

Opinions below have been described in the petition for writ of certiorari under caption "Opinions Below."

II.

JURISDICTION

The statement as to jurisdiction has heretofore been set forth in the petition for writ of certiorari.

III.

STATEMENT OF THE CASE

The facts have been adequately stated in the petition for writ of certiorari under the caption "Summary Statement."

IV.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals erred in affirming the decision of the District Court.

2. The Circuit Court of Appeals erred in not ruling that petitioner had entered upon service of second sentence imposed on petitioner on May 25th as of that date.

3. The Circuit Court of Appeals erred in not holding that *direction by District Court* as to time when service of imprisonment should begin, set forth in second sentence imposed on petitioner on May 25, 1942, when petitioner was then on unrevoked conditional parole, was invalid, in that judge had no power to tell Board of Paroles how it must act in light of second sentence.

V.

SUMMARY OF ARGUMENT

A. When a person is on parole and before revocation thereof by Parole Board is sentenced and committed for second offense, his parole is violated and service of his original sentence is interrupted and suspended. Thereafter imprisonment is attributable to second sentence, and service of unexpired term of original sentence cannot begin to run before the date that such person is returned to prison under Parole Board warrant.

B. Sentence of imprisonment of a convicted person commences to run from the date on which such person is committed to jail awaiting transportation to institution designated for service of sentence imposed.

C. Where prisoner is on unrevoked parole, directions contained in second sentence, which require action of revocation of parole board before such second sentence should begin, are invalid and beyond the power of the sentencing judge, because such direction invades the discretion and authority exclusively reserved to Board of Paroles.

D. When a sentence is subject to several constructions, one or more of which may be invalid, that construction which makes such sentence valid is accepted.

ARGUMENT

A

When a person is on parole and before revocation thereof by parole board is sentenced and committed for second offense, his parole is violated and service of his original sentence is interrupted and suspended. Thereafter imprisonment is attributable to second sentence, and service of unexpired term of original sentence cannot begin to run before the date that such person is returned to prison under parole board warrant.

The main question in this case is the time when petitioner entered upon service of second sentence imposed on May 25, 1942. If as contended by respondent, petitioner entered upon service of that sentence on November 10, 1944, *after* he had completed service of his original sentence, then the decision of the District Court and Circuit Court of Appeals is correct; if as contended by petitioner, he entered upon service of that sentence on May 25, 1942, *before* execution of Parole Board warrant and *before* revocation of parole, then the lower courts erred and petitioner's Writ of Habeas Corpus should be granted.

The Circuit Court of Appeals in its opinion held that petitioner's second sentence, imposed while petitioner was on parole, was to commence *after* completion of unexpired term of original sentence, and in this departed from the weight of authority.

This Court and other circuits have had occasion to discuss the rules of law and statutes here applicable.

In *Zerbst v. Kidwell,* 304 U.S. 359 (1938) the facts appearing are; that Kidwell had been paroled before completion of original sentence. Before expiration of original sentence, and while on parole, he committed second Federal offense for which he was convicted and sentenced and thereafter completely served such second sentence. After completion of his second sentence he was held in custody by the Warden of the penitentiary, under warrant of a parole board member alleging violation of parole.

The District Court believing the original sentence "began to run again the moment he was received at the penitentiary" discharged respondent from custody on habeas corpus proceedings, and the Circuit Court of Appeals (5th) affirmed. Certiorari was granted and the same brought to this Court. Zerbst, the petitioner, contended that when respondent violated his parole by committing second crime, he was no longer in custody under original sentence, that service of original sentence was interrupted and suspended and not resumed until completion of second sentence.

This Court upheld the latter contention and at page 361 said, in part, as follows:

> "When respondent committed a Federal crime while on parole, for which he was arrested, convicted, sentenced and imprisoned, not only was his parole violated, but service of his original sentence was interrupted and suspended. Thereafter, his imprisonment was attributable to his second sentence only, and his rights and status as to his first sentence were 'analogous to those of an escaped convict.'" (Citing *Anderson v. Corall,* 263 U.S. 193, 196, 197).

The question here raised is also found in *Hammerer v. Huff* (C.C.A. D.C.) 110 Fed. (2nd) 113. The facts therein

appearing were similar to those in *Zerbst v. Kidwell,* supra, except that here the sentencing judge had included directions in second sentence that it and unexpired portion of original sentence should run concurrently.

The Court followed the ruling laid down in *Zerbst v. Kidwell,* supra, and quoted from that decision at length, and at page 116 (3-5) said:

> "We think this decision of the Supreme Court, in view especially of the italicized portions of the opinion, makes clear that in the instant case only the District Board of Parole, by terminating the conditional release, could cause the unexpired portion of the first sentence to commence to run again, and that the trial judge in imposing the second sentence had no power to cause it and the unexpired portion of the first sentence to run concurrently.
>
> "The appellant makes the further contention that under the Act of July 15, 1932, c. 492, Sec. 6, 47 Stat. 698, D.C.Code (Supp. 1939) tit. 6, Sec. 456, supra, it was the duty of the Board of Parole at the next meeting after the issuance of the warrant and the return of the appellant to the penitentiary to give him an opportunity to appear before the Board, and that had it done so the Board itself might have terminated the conditional release and thus caused the unexpired portion of the first sentence to run concurrently with the second. We do not rule upon the question whether under the section referred to it was the duty of the Board to cause the appellant to be brought before it at the next meeting after his return to the penitentiary under the second sentence, rather then upon the parole warrant. The question on this record is not what the Board might have done. The question is whether what the trial judge did could have the effect to cause a concurrent running of the two sentences. This we have sufficiently answered in the negative."

The earliest time when the unexpired term of imprisonment of original sentence could begin to run under Parole Board warrant for violation of terms of parole is statutory, and reads as follows:

> "VIOLATION OF PAROLE; WARRANT FOR RETAKING PRISONER; EFFECT OF VIOLATION ON UNEXPIRED TERM OF IMPRISONMENT.—The said board or any member thereof, shall hereafter have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. *The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution,* and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve." *T. 18, U. S. C., Sec. 723(c).*

Prior to May 26, 1942 Petitioner was in the Wayne County Jail at Detroit, Michigan under parole board warrant for retaking "awaiting further disposition" (R. 18), and it was not until May 26, 1942 that the warrant was executed by delivering him to the Federal correctional institution at Milan.

The second sentence imposed on petitioner, contained the following direction:

> "It is further ordered by the Court that the sentence imposed upon defendant in this case shall run consecutively to sentence that defendant is now serving in case No. 21737" (R. 4).

Under the facts in the case at bar, the decisions and statutes applicable thereto, it is obvious that petitioner, on May 25, 1942, being on parole as of then, unrevoked by the Board of Parole, was not serving sentence in case No. 21737, the same being interrupted and suspended,

and that further disposition by the Board was required before original sentence could begin to run.

It, therefore, follows that the petitioner, on May 25, 1942, was imprisoned on second sentence only, and commenced serving the same on that date when he was received at the local Jail awaiting transfer to designated institution (R. 5).

Petitioner contends that the Circuit Court of Appeals erred in holding that second sentence began to run after completion of original sentence, and that therefore this Court should grant certiorari.

B

Sentence of imprisonment of a convicted person commences to run from the date on which such person is committed to jail awaiting transportation to institution designated for service of sentence imposed.

At this point we wish to call this Court's attention to the fact, that the time when sentence begins to run under sentence of imprisonment of a person convicted of a crime in a Federal Court, differs radically from the time when re-imprisonment begins to run under parole board proceedings for violation of parole.

The unexpired term of a prisoner retaken under Parole Board warrant cannot begin to run until he (prisoner) is returned to the institution designated in such warrant.

T. 18—U. S. Code, 723(c) Supra.

The time when sentence of imprisonment begins to run in case of person convicted of crime and sentenced by Federal Court is statutory, and reads as follows:

> "TIME WHEN SENTENCE BEGINS TO RUN.—The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the pentientiary, or jail for service of said sentence: *Provided, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention.* No sentence shall prescribe any other method of computing the term."
>
> *T. 18—U. S. C. par. 709 (a).*

It is the contention of the Petitioner that when he was placed in the Wayne County Jail on May 25, 1942 he thereby commenced serving his second sentence as effectively as if he had actually been taken to and imprisoned in the Federal institution designated. *Such being the case, he was entitled to have the same credited as one day upon service of such second sentence.*

> "Where Marshal takes a party under sentence into custody and takes him to a local jail pursuant to sentence, such party is in custody to await transportation to the place in which his sentence is to be served."
>
> *Moss v. U. S.* 72, Fed. (2nd), 30.

The parole board warrant for retaking was not fully executed, nor was Petitioner received at a Federal correctional institution, until the following day, May 26, 1942, and under the statute applicable he was not imprisoned

thereunder. The preliminary return of such parole warrant of retaking shows that prior to such date and during the time he was at the Wayne County Jail he was "awaiting further disposition" (R. 18).

It, therefore, follows that Petitioner not having been imprisoned under a fully executed parole board warrant for retaking in accordance with the provisions of the statute governing the same *(T. 18—U. S. Code, par. 723 (c)* Supra), and Petitioner, for all intents and purposes having been placed in the Federal correctional institution designated in accordance with his second sentence of May 25, 1942, that Petitioner was on the last mentioned date imprisoned therein *and sentence thereunder had begun to run.*

Petitioner contends that the Circuit Court of Appeals erred in not so holding and that therefore this court should grant certiorari.

C

Where prisoner is on unrevoked parole, directions contained in second sentence, which require action of revocation of parole board before such second sentence should begin, are invalid and beyond the power of the sentencing judge, because such direction invades the discretion and authority exclusively reserved to board of paroles.

This has been ruled upon and decided in the affirmative in the Circuit Court of Appeals for the District of Columbia, *Hammerer v. Huff*, supra; *Tippitt v. Wood*, 140 Fed.

(2nd), 689, and in the Circuit Court of Appeals for the Tenth Circuit, *Tippitt v. Squier,* 145 Fed. (2nd) 211.

In the case of *Tippitt v. Wood,* supra, facts are similar to those in *Zerbst v. Kidwell,* supra and *Hammerer v. Huff,* supra. There was, however, included in the sentence the following provision: "* * * Sentence to run concurrently with any revocation of present * * * conditional release from U. S. Penitentiary at Leavenworth, Kansas * * *." The court in its majority opinion, at page 692, has this to say:

> "Tippitt is very clearly serving a sentence which Judge Allred did not intend that Tippitt should serve. The tragic fact for Tippitt seems to be that Judge Allred sought to encompass his judicial intention by means that were beyond his power and methods that exceeded his authority. Had Judge Allred, wishing to imprison Tippitt for a maximum of four years in any event, substracted the unserved portion of Tippitt's first sentence from four years, and imposed an absolute and unconditional sentence for a period of time represented by the difference between the two figures (four years minus 734 days), there could be no question, we think, as to the validity of the sentence.
>
> "But that is not what Judge Allred did. He first imposed upon Tippitt a sentence of four years. So far, so good. Then Judge Allred undertook (by prescribing a concurrent running of both sentences) to tell the Board what the Board must do under the circumstances. This direction lacked legal validity; for Judge Allred had no power to tell the Board how it must act in the light of Judge Allred's sentence. It is equally true that the Board could have issued no instructions to Judge Allred as to how he (in pronouncing the second sentence) must act in the light of the Board's previous action. The two jurisdictions are separate and distinct, each from the other. Unto the Board must be rendered the things that are

> the Board's; to the Judge, the things that are the judge's. Technically speaking, it was a legal impossibility for Judge Allred to make the second sentence run concurrently with the first sentence; for this first sentence was not then running but had been suspended. He could not himself awaken the sleeping sentence; by the same token, he could not forbid the Board to arouse this first sentence from the Board-imposed coma. Only the power that erects here has the power to remove."

The case of *Tippitt v. Squier*, supra, at page 213, confirms dicta in *Tippitt v. Wood*, supra, to effect that directions to the Board of Parole contained in a second sentence are invalid and beyond the power of the Court.

Petitioner contends that the Circuit Court of Appeals erred in not holding that that portion of petitioner's second sentence, which would require the Board of Parole to act on revocation of Parole before second sentence could begin to run, was invalid and beyond the power of the District Judge. Therefore, Petitioner further contends that this Court should grant certiorari.

D

When a sentence is subject to several constructions, one or more of which may be invalid, that construction which makes such sentence valid is accepted.

Examination of second sentence imposed on petitioner discloses, *if the last paragraph thereof be eliminated*, a sentence complete and in proper form. (R. 4). *T. 18, U. S. C. A. 709 (a)* supra.

It has been consistently held that the sentencing Judge cannot invade the exclusive authority vested in the parole board so as to cause second sentence and original sentence to run concurrently. *Zerbst v. Kidwell*, supra; *Hammerer v. Huff*, supra; *Tippitt v. Wood*, supra; *Tippitt v. Squier*, supra. *Title 18, U. S. Code, Sec. 719.* The cases herein cited applying the rule that it is beyond the power of such judge to cause the Board of Parole to act with respect to original sentence, until such time as the Board in its discretion sees fit to act.

The decisions herein cited have laid down a consistent and correct practice with respect to second sentences imposed on prisoners on parole; second sentences imposed are served *first;* the time and manner of concurrency of service of original sentence is left to the Board of Parole.

The case at bar attempts to apply the converse of the above cited practice, causing second sentence to be subject to two constructions. We submit the same reasoning and announced rules of law here apply, that is, that the sentencing judge has invaded the exclusive jurisdiction of the board of parole, which is beyond his judicial power.

The court in discussing this phase of the law, in *Tippitt v. Squier,* supra, at page 213, has said, as follows:

> "If this sentence be subject to several constructions, that which makes it valid should be accepted. The phrase 'revocation of present suspended sentence and conditional release' refers to the discretionary right of the Board of Paroles to take such action under *18 U. S. C. A. Sec. 719.* The 'revocation' is a future board action. It does not refer to the Texas crime itself, for which the board may or may not revoke the good conduct deductions."

It is the contention of the petitioner that second sentence imposed on petitioner on May 25, 1942, excluding the last paragraph thereof, was complete and according to the established practice in situations as in the case at bar; that the last paragraph thereof was invalid and, at best only a gratuitous direction, not binding upon the parole board. It therefore follows that petitioner commenced to serve second sentence imposed on May 25, 1942, and that the Circuit Court of Appeals erred in not so holding.

It is, therefore, respectfully submitted that writ of certiorari should be granted.

JAMES V. BELLANCA,

DONALD F. WELDAY,
Attorneys for Petitioner,

WILLIAM G. FITZPATRICK, JR.,
Of Counsel.

APPENDIX

T. 18 U. S. C. A. Sec. 716 (a). Continuance of parole until expiration of maximum sentence.—Any prisoner hereafer sentenced, who may be paroled under authority of the parole laws, shall continue on parole until the expiration of the maximum term or terms specified in his sentence without deduction of such allowance for good conduct as is or may hereafter be provided for by law. *(June 29, 1932 c. 310, Sec. 3, 47 Stat. 381).*

T. 18 U. S. C. A. Sec. 716 (b). Prisoners released under Secs. 710 to 713 treated as on parole until expiration of maximum term.—Any prisoner who shall have served the term or terms for which he shall hereafter be sentenced, less deductions allowed therefrom for good conduct, shall upon release be treated as if released on parole and shall be subject to all provisions of law relating to the parole of United States prisoners until the expiration of the maximum term or terms specified in his sentence: Provided, That this section shall not operate to prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody. *(June 29, 1932, c. 310, Sec. 4, 47 Stat. 381).*

T. 18 U. S. C. A. Sec. 717). Violation of parole; warrant for retaking prisoner.—If the warden of the prison or penitentiary from which said prisoner was paroled or said board of parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the

prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same, for the retaking of such prisoner. *(June 25, 1910, c. 387, Sec. 4, 36 Stat. 820; May 13, 1930, c. 255, Sec. 1, 46 Stat. 272).*

T. 18 U. S. C. A. Sec. 718. Officers authorized to execute warrant; expenses.—Any officer of said prison or any Federal officer authorized to serve criminal process within the United States, to whom such warrant shall be delivered, is authorized and required to execute such warrant by taking such prisoner and returning him to said prison within the time specified in said warrant therefor. All necessary expenses incurred in the administration of this chapter shall be paid out of the appropriation for the prison in connection with which such expense was incurred, and such appropriation is hereby made available therefor. *(June 25, 1910, c. 387, Sec. 5, 36 Stat. 820).*

T. 18 U. S. C. A. Sec. 719. Action by board on issue of warrant; revocation of parole.—At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole and the board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken in account to diminish the time for which he was sentenced. *(June 25, 1910, c. 387, Sec. 6, 36 Stat. 820; May 13, 1930, c. 255, Sec. 1, 46 Stat. 272).*

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 747

ANTHONY TERAMINE, PETITIONER

v.

C. J. SHUTTLEWORTH, WARDEN, FEDERAL CORRECTIONAL INSTITUTION, MILAN, MICHIGAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The circuit court of appeals rendered no opinion. The judgment of that court (R. 24) is reported at 151 F. 2d 602.

JURISDICTION

The judgment of the circuit court of appeals was entered on October 17, 1945 (R. 24). The petition for a writ of certiorari was filed on January 15, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a prisoner while in custody under a parole violation warrant may be validly sentenced on conviction for another offense to serve a term of imprisonment to begin at the expiration of the unexpired term of his first sentence.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra,* pp. 9–10.

STATEMENT

Petitioner was convicted on his plea of guilty in the United States District Court for the Eastern District of Michigan of violations of the Harrison Narcotic Act (26 U. S. C. 2550, *et seq.*), and he was sentenced on November 20, 1934, to imprisonment for a term of eight years (R. 7–9). On April 26, 1940, he was released conditionally (on parole) pursuant to the provisions of 18 U. S. C. 716b (Appendix, *infra,* p. 9). On April 15, 1942, a member of the Board of Parole issued a warrant for petitioner's retaking on the ground that he had violated the conditions of his release by submitting false reports in February and March 1942. He was retaken on April 18, 1942, committed to the Wayne County Jail at Detroit, Michigan, and delivered to the Federal Correctional Institution at Milan, Michigan, on May 26, 1942. (R. 15–18.)

In the meantime, on May 25, 1942, petitioner pleaded guilty in the District Court for the East-

ern District of Michigan to an indictment charging conspiracy to violate the Harrison Narcotic Act, and he was sentenced on that date to imprisonment for a term of two years, the sentence to run consecutively to the sentence that petitioner "is now serving in Case No. 21737 [the earlier case]" (R. 3–4). The Federal Correctional Institution at Milan, Michigan, was designated by the Marshal, the authorized representative of the Attorney General, as the place of confinement, and the Marshal's return bears the endorsement that petitioner was delivered to the Wayne County jail on May 25, 1942, pending transfer to the designated institution, and that on May 26, 1942, he was delivered to that institution (R. 5). On August 7, 1942, the Board of Parole revoked petitioner's parole under the earlier sentence (R. 2).

The present proceeding arose upon a petition for a writ of habeas corpus filed by petitioner in the District Court for the Eastern District of Michigan on November 24, 1944. Petitioner alleged that he was entitled to his release from custody on the ground that he had completed the service of both of his sentences. He asserted that he had begun to serve the second sentence of two years on May 25, 1942, and that he had completed service of it and of the unexpired portion of the first sentence on November 9, 1944. (R. 1–10.) An order to show cause was issued (R. 11), and the respondent filed an answer in which he alleged that petitioner had not begun to serve the

second sentence until November 10, 1944, the day following his completion of service of the first sentence (R. 12–18). After hearing argument, the district court dismissed the petition for a writ of habeas corpus (R. 19). On appeal to the Circuit Court of Appeals for the Sixth Circuit, the order was affirmed, the court holding that petitioner did not begin to serve his second sentence until November 10, 1944 (R. 24).

ARGUMENT

In this Court petitioner contends (Pet. 2–3, 9–20), as he did in the courts below, that he began service of his second sentence of two years on May 25, 1942, and that he had completed serving that sentence and the unexpired term of his original sentence on November 9, 1944. His argument, as we understand it, is that his conviction for the second offense constituted a violation of his parole which interrupted and suspended service of his original sentence, and service thereof did not begin again until May 26, 1942, when he was returned to the penitentiary; that, accordingly, his imprisonment on May 25, 1942, at the Wayne County jail must be attributable to his second sentence; and, presumably, that after May 26, both sentences were being served concurrently. We submit that these contentions are plainly without merit.

Contrary to petitioner's views, he was serving the unexpired portion of his original sentence

at the time he was again sentenced on May 25, 1942. Service of the original sentence of eight years began on November 20, 1934, and the maximum term thereof would not have expired until November 19, 1942. When petitioner was conditionally released on April 26, 1940, pursuant to the provisions of the "good-time" statute (18 U. S. C. 710, 713), he remained on parole under 18 U. S. C. 716b (*infra*, p. 9) for the maximum term of his sentence. Before that time arrived, the Board of Parole was authorized under 18 U. S. C. 717 and 723c (*infra*, pp. 9–10) to issue a warrant for his retaking on the ground that he had violated his parole. This it did on April 15, 1942.[1] At that time, at least, service of petitioner's original sentence was interrupted and suspended because he had breached his parole. Cf. *Zerbst* v. *Kidwell*, 304 U. S. 359, 361, 362. Petitioner was taken into actual custody under the warrant on April 18, 1942, and this step, under 18 U. S. C. 723c (*infra*, p. 10), constituted a resumption by petitioner of service of his sentence.[2] Cf. *Zerbst* v. *Kidwell*, 304 U. S. at p. 362. There-

[1] It appears that the parole violation was that petitioner had submitted false reports to the Board of Parole in February and March 1942 (see R. 15).

[2] Petitioner's argument (Pet. 10–14) that his unexpired term could not under Section 723c begin to run until he was actually returned to the penitentiary is predicated on the language of the Section as it read prior to its amendment by the Act of June 29, 1940, c. 449, § 1, 54 Stat. 692. Before the amendment the Section contained the language: "The unex-

fore, when the sentence of May 25, 1942, was imposed, petitioner, as that sentence recognized (*supra,* p. 3), was serving his original sentence.

Furthermore, it is clear that the direction in the second sentence that it should run consecutively to the first sentence (*supra,* p. 3) was proper. The requirement of 18 U. S. C. 709a (*infra,* p. 9) that a sentence of imprisonment shall commence to run from the date on which the prisoner is received at a jail to await transportation to the designated place of confinement, does not abolish the long-sanctioned practice of imposing consecutive sentences to begin at a future time. The purpose of this Section was to insure a prisoner credit for the time he might spend awaiting transportation to the place of confinement. *Brown* v. *Johnston,* 91 F. 2d 370, 372 (C. C. A. 9), certiorari denied, 302 U. S. 728; *Ellerbrake* v. *King,* 116 F. 2d 168, 170 (C. C. A. 8). And a prisoner serving one sentence is not delivered for service of a second consecutive sentence within the meaning of the statute until the first sentence has legally expired. *Eyler* v. *Aderhold,* 73 F. 2d 372 (C. C. A. 5), followed in *Edwards* v. *Aderhold* 73 F. 2d 374 (C. C. A. 5), certiorari denied *sub nom. Knight* v.

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pired term of imprisonment * * * shall begin to run from the date he [the prisoner] is returned to the institution." As amended, the Section contains the following language: "The unexpired term of imprisonment * * * shall begin to run from the date he is returned to the custody of the Attorney General under said warrant * * *."

Aderhold, 294 U. S. 710; *Miketich* v. *United States,* 72 F. 2d 550 (C. C. A. 3). Here petitioner's first sentence did not terminate until November 9, 1944 (R. 2, 13), and it was at that time that he was "received" (18 U. S. C 709a) at the penitentiary for service of his second sentence.

Finally, there is no basis for petitioner's claim (Pet. 4, 8, 9, 16–18, 19–20) that the direction in the second sentence that it should run consecutively to the first sentence is void because it constituted an illegal mandate to the Board of Parole that it must revoke petitioner's parole in order to make the direction effective. Petitioner relies (Pet. 16–18) on several cases in the lower federal courts holding that in the case of a prisoner convicted of an offense while at large on parole, the sentence may not validly direct that it shall run concurrently with the unexpired term of his original sentence, since such a direction would compel the Board of Parole, in order to give effect to it, to have the prisoner at once resume service of his original sentence, whereas, under *Zerbst* v. *Kidwell,* 304 U. S. 359, the Board is exclusively authorized to require a parole violator to serve the unexpired portion of his sentence in prison, in addition to a sentence for an offense committed while on parole. *Tippitt* v. *Squier,* 145 F. 2d 211 (C. C. A. 9); *Tippitt* v. *Wood,* 140 F. 2d 689 (App. D. C.); *Hammerer* v. *Huff,* 110 F. 2d 113 (App. D. C.). Manifestly, these cases do not avail petitioner. The situations are not similar.

In the cases cited the Board of Parole had not acted to have the prisoner resume service of his original sentence, and the court's direction that the second sentence should be served concurrently with the original sentence could not be given effect unless the Board caused immediate resumption of service of the original sentence. In this case, on the other hand, the Board of Parole, prior to the imposition of the second sentence, had, by causing petitioner to be taken into custody under the warrant, brought about by operation of law (see 18 U. S. C. 723c, *infra*, p. 10) a resumption of service of the original sentence. The direction in the second sentence was not dependent for performance upon future Board action.

CONCLUSION

The case was correctly decided below, and there is no conflict of decisions or question of importance involved. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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FEBRUARY 1946.

APPENDIX

18 U. S. C. 709a. The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: *Provided,* That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term.

18 U. S. C. 716b. Any prisoner who shall have served the term or terms for which he shall after June 29, 1932, be sentenced, less deductions allowed therefrom for good conduct, shall upon release be treated as if released on parole, and shall be subject to all provisions of law relating to the parole of United States prisoners until the expiration of the maximum term or terms specified in his sentence: * * *.

18 U. S. C. 717. If the warden of the prison or penitentiary from which said prisoner was paroled or the Board of Parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer hereinafter authorized to execute the same for the retaking of such prisoner.

18 U. S. C. 718. Any officer of any Federal, penal, or correctional institution or any Federal officer authorized to serve criminal process within the United States, to whom such warrant shall be delivered, is authorized and required to execute such warrant by taking such prisoner and returning him to the custody of the Attorney General. * * *

18 U. S. C. 719. When a prisoner has been retaken upon a warrant issued by the Board of Parole, he shall be given an opportunity to appear before said Board of Parole, a member thereof, or an examiner designated by the Board. The said Board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced.

18 U. S. C. 723c. The Board of Parole created by section 723a of this title, or any member thereof, shall hereafter have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve.

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